

INTELSAT has its own distinct “juridical personality.” *INTELSAT Agreement*, Art. IV(a), 23 U.S.T. at 3822. However, because of its intergovernmental treaty status, INTELSAT is not subject to the regulatory jurisdiction of the United States or any other national government. *See id.*, Art. XV(b), 23 U.S.T. at 3856 (establishing INTELSAT’s regulatory immunity); *see also International Organizations Immunities Act*, 22 U.S.C. § 288 *et seq.* (1994 & Supp. 2000); Exec. Order No. 11996, 42 Fed. Reg. 4331 (Jan. 24, 1977) (designating INTELSAT as an immune international organization). Consequently, INTELSAT satellites are not regulated by the FCC.<sup>3</sup> It is beyond cavil that INTELSAT itself is not subject to regulatory fees for its satellites. *See PanAmSat Corp. v. FCC*, 198 F.3d 890, 896 (D.C. Cir. 1999) (acknowledging that INTELSAT is, “by executive order, [an] international organization[ ] subject to

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<sup>3</sup> *See Amendment of the Commission’s Regulatory Policies To Allow Non-U.S. Licensed Space Stations To Provide Domestic and International Satellite Service in the United States, Report and Order*, 12 F.C.C. Rcd 24094, 24148-149 (1997) (“DISCO-II Order”) (discussing INTELSAT’s immunity), *modified on recon. in other respects*, 15 F.C.C. Rcd 7207 (1999), *corrected by*, 15 F.C.C. Rcd 5042 (2000). *petition for review pending*, No. 98-1011 (D.C. Cir. filed Jan. 12, 1998).

the International Organizations Immunities Act,” and therefore immune from FCC regulation).

As U.S. Signatory to INTELSAT, COMSAT signed the INTELSAT Operating Agreement on behalf of the United States, and represents the United States within INTELSAT. *See* 47 U.S.C. §§ 721(a), 735(a), 742 (setting forth certain of COMSAT’s Signatory responsibilities). In its Signatory capacity, COMSAT is an INTELSAT shareholder and is responsible for making capital investments to support the INTELSAT system in response to capital calls by INTELSAT. *INTELSAT Operating Agreement*, Art. 4(a), 23 U.S.T. at 4094. Because COMSAT owns about a 20 percent investment share in INTELSAT, it has 20 percent of the vote on INTELSAT’s Board of Governors. The remaining 80 percent share is controlled by other INTELSAT Signatories.

From 1962 to 1999, COMSAT held the exclusive right to lease satellite capacity directly from INTELSAT in order to provide satellite communications services in the United States. During this time period, all U.S. entities that wished to lease capacity from INTELSAT were required to obtain this capacity through COMSAT. However, in September 1999, the FCC eliminated COMSAT’s exclusive right to provide access to the INTELSAT system. *See Direct Access to the INTELSAT System*, 14 F.C.C. Rcd 15703, 15796-797 (1999) (“*Direct Access*

*Order*”) (permitting non-Signatory U.S. entities to contract for INTELSAT capacity and services directly from INTELSAT at the same rates paid by COMSAT). Congress later codified this FCC action by passing the Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), *codified at* 47 U.S.C. §§ 761-769 (Supp. 2001) (“*ORBIT Act*” or “*ORBIT*”). *See ORBIT* § 641(a), 47 U.S.C. § 765(a).

The ORBIT Act fundamentally restructured U.S. international satellite telecommunications policy. As a result, in fiscal year 2000 (the year at issue here), COMSAT’s role *vis-a-vis* INTELSAT was significantly changed. Specifically, COMSAT’s Signatory responsibilities are now limited to (1) representing the United States on INTELSAT’s Board of Governors (in which capacity it acts subject to the direction of the U.S. government), 47 U.S.C. § 721(a)(4), and (2) being the United States investor in INTELSAT (in which capacity it has the same indirect interest in the INTELSAT satellites as do more than 200 other INTELSAT investor-owners), 47 U.S.C. § 701(c).<sup>4</sup> Aside from

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<sup>4</sup> Although COMSAT’s Signatory responsibilities are significant in their own right, they are not material to the issue of whether the Commission may impose regulatory fees on COMSAT. *See COMSAT Corp. v. FCC*, 114 F.3d 223, 227 (continued)

these responsibilities, COMSAT now has exactly the same status as any other U.S. entity that seeks to lease satellite capacity directly from INTELSAT for any purpose.<sup>5</sup>

Just as the ORBIT Act removed COMSAT from its role as the exclusive provider of INTELSAT satellite capacity to U.S. entities, the Commission long ago removed INTELSAT from its role as the sole provider of satellite communications services in the United States. In 1986, the Commission opened the U.S. market to separate international satellite systems. *See generally Establishment of Satellite Systems Providing International Communications*, 101 F.C.C.2d 1046, 1049-50 (1985), *modified in part on recon.*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon. denied*, 1 F.C.C. Rcd 439 (1986). Although many of these separate systems (for example, the PanAmSat system discussed *infra.* at pp. 15), are regulated by the FCC, the Commission since 1981 has, under certain circumstances, also allowed U.S. entities to use unregulated foreign

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(D.C. Cir. 1997) (holding that the Commission may not impose fees for its regulation of COMSAT's Signatory responsibilities).

<sup>5</sup> Direct access customers must pay COMSAT a small fee to defray the costs of COMSAT's Signatory activities on behalf of the U.S. government. *Direct Access Order*, 14 FCC Rcd at 15721, 15734.

satellites (e.g., Canadian and Mexican systems) to provide communications satellite services in the United States.<sup>6</sup> *See infra*, at pp. 34-35 (discussing Loral Space & Communications' ownership interest in Mexican-licensed "Satmex" satellite system).

In fiscal year 2000, there were almost 200 satellites in geosynchronous orbit, of which approximately 73 served the United States. *See Phillips Satellite Industry Directory*, at 17-234, 279-413 (21st ed. 1999) (J.A. \_\_\_) (setting forth complete information about each of these satellites and their operators). Only 47 of those satellites were regulated by the FCC. INTELSAT's global fleet consisted of 17 commercial communications satellites, four of which did not serve (and, indeed, were not visible from) the United States. That same year, COMSAT utilized about 17 percent of the INTELSAT system's satellite capacity. The remaining 83 percent was used by foreign Signatories and by United States and foreign direct access customers (amounting to over 200 entities in all).

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<sup>6</sup> *See Transborder Satellite Video Services*, 88 F.C.C.2d 258, 285-287 (1981); *DISCO-II Order*, 12 F.C.C. Rcd at 24096-99.

## **The Adoption Of Regulatory Fees**

Until 1993, neither COMSAT nor any other company was required to pay any annual “regulatory fee” to the FCC. In 1993, however, Congress amended the Communications Act of 1934 by adding a new “Section 9.” *See Communications Act* § 9, *codified at* 47 U.S.C. § 159. Section 9 enables the FCC to recover the costs of the Commission’s “enforcement activities, policy and rulemaking activities, user information services, and international activities.” 47 U.S.C. § 159(a)(1); *see also COMSAT Corp.*, 114 F.3d at 225 (discussing purposes of Section 9 fees).

Among other things, Section 9 provides that regulatory fees shall be assessed for “Radio Facilities,” including “Space Station[s] (per operational station in geosynchronous orbit) (47 CFR Part 25).” 47 U.S.C. § 159(g) (listing regulatory fee categories).<sup>7</sup> The Conference Committee Report made clear that

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<sup>7</sup> Title 47 of the Code of Federal Regulations compiles the rules of the FCC. Thus, the phrase “47 CFR Part 25” is used interchangeably throughout this brief with the phrase “Part 25 of the Commission’s Rules.” Part 25 of the Commission’s Rules is entitled “Satellite Communications.” *See* 47 C.F.R. §§ 25.101-25.601. Unsurprisingly, it contains the Commission’s rules regulating satellite communications. *See infra*, at pp. 26-27 n.16 (discussing particulars of Part 25).

Section 9 space station regulatory fees did not apply to INTELSAT satellites.

Instead, those fees were:

to be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will apply only to space stations directly licensed by the Commission under Title III of the Communications Act. *Fees will not be applied to space stations operated by international organizations subject to the International Organizations Immunities Act.*

H.R. Rep. No. 102-207, at 26 (1991) (emphasis added), *incorporated by reference* in Conf. Rep. H.R. Rep. No. 103-213, at 499 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1188 (emphasis added).<sup>8</sup> As noted, INTELSAT is subject to the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.*; *see supra*, at p.4. Consistent with the plain text of the provision and Congress's

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<sup>8</sup> Title III of the Communications Act authorizes the FCC to regulate the use of "radio facilities" used to transmit certain electronic emissions through the radio spectrum. *See, e.g., Preemption of State Entry Regulation in the Public Land Mobile Service*, 1986 WL 291439, 59 Rad. Reg. 2d (P&F) 1518, ¶ 22 n.42 (1986) (stating that "the Commission has plenary Title III authority over the use of the spectrum and the licensing of radio facilities"), *clarified in other respects*, 2 F.C.C. Rcd 6434 (1987). Communications satellites use "radio facilities" (called "transponders") to transmit electronic emissions which communicate with the earth. Accordingly, communications satellites subject to U.S. jurisdiction are licensed by the FCC pursuant to Title III. However, as discussed at Subpart I.A.2, *infra*, not every satellite that provides service in the United States is subject to U.S. jurisdiction (or, thus, to the FCC's Title III regulation).

clearly expressed intent, the Commission never assessed any Section 9 regulatory fees against COMSAT or any other U.S. entity for its use of INTELSAT space segment capacity before the FCC released the *FY 2000 Order* challenged here.

### **COMSAT Pays Other Regulatory Fees**

Although COMSAT did not have to pay Section 9 radio facilities (*i.e.*, Part 25) fees based on the INTELSAT satellites before fiscal year 2000, it did pay (and continues to pay) other FCC fees, including “[Section 8] application fees, fees applicable to international bearer circuits, fees covering Comsat’s non-Intelsat satellites, and earth station fees.” *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and Order*, 15 F.C.C. Rcd 14478, 14489 (2000) (J.A. \_\_\_\_).<sup>9</sup> International bearer circuit fees are imposed on all vendors of satellite (and undersea fiber cable) capacity that provide service to their customers. *See Assessment and Collection of Regulatory Fees for Fiscal Year*

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<sup>9</sup> Application fees, at discussed *infra*, at Subpart I.B.1, are assessed pursuant to Section 8 of the Communications Act, 47 U.S.C. § 158. The other fees listed here are assessed pursuant to Section 9 of the Communications Act, 47 U.S.C. § 159.



*1999, Report and Order*, 14 F.C.C. Rcd 9868, 9892-93 (1999) (“*FY 1999 Order*”).<sup>10</sup>

COMSAT also pays Section 9 fees in connection with two U.S.-licensed non-INTELSAT space stations that it operates (the COMSTAR and MARISAT satellites). Furthermore, COMSAT pays Section 9 fees on each of its U.S.-licensed earth stations, including those that access INTELSAT satellites. *Id.*

Accordingly, in fiscal year 1998, COMSAT “paid regulatory fees for two geostationary space stations, 142 earth stations, and 53,957 international bearer circuits for a total of \$585,172.” *Id.* at 9892. In fiscal year 1999, COMSAT paid \$698,139 in Section 9 regulatory fees. In fiscal year 2000, not counting the INTELSAT space stations at issue, COMSAT paid Section 9 regulatory fees of \$703,975. Including the INTELSAT space stations, COMSAT paid Section 9 regulatory fees of \$2,313,025.

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<sup>10</sup> Specifically, an “international bearer circuit” fee is a service fee imposed on international telecommunications carriers for each “64 kbps circuit or [its] equivalent” that provides international telecommunications service. 47 U.S.C. § 159(g).

## **Efforts To Impose Additional Fees On COMSAT**

The FCC has promulgated an annual Notice of Proposed Rulemaking (“NPRM”) pursuant to Section 9 for every fiscal year since 1994, seeking comment on its proposed regulatory fee schedule. Each NPRM is followed by an annual final Order declaring the requisite “Section 9” regulatory fees for that fiscal year. Given the text of Section 9 and the legislative history quoted above, the FCC in 1994 did not even consider attempting to impose Part 25 space station fees on COMSAT for COMSAT’s leases of INTELSAT capacity. *See Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order*, 9 F.C.C. Rcd 5333 (1994) (“*FY 1994 Order*”). Nor did anyone at that time suggest that Section 9 should be construed as imposing fees on any non-U.S. licensed communications facilities.

In spite of Section 9’s text and legislative history and the Commission’s *FY 1994 Order*, COMSAT’s competitors have long disagreed with the choice made by Congress to exempt INTELSAT space stations from Section 9 fees. In 1995, the Commission responded to these efforts by explaining that it could *not* apply regulatory fees to “space stations operated by international organizations subject to the International Organizations Immunities Act,” *i.e.* INTELSAT and another satellite system not at issue here. *See Assessment and Collection of Regulatory*

*Fees for Fiscal Year 1995, Report and Order*, 10 F.C.C. Rcd 13512, 13550 (1995) (citations omitted).

In 1996, the FCC reiterated that “Comsat was not subject to payment of a geosynchronous satellite regulatory fee for its Intelsat and Inmarsat satellites.” *Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Notice of Proposed Rulemaking*, 11 F.C.C. Rcd 16515, 16526-527 (1996). That year, however, the Commission sought to impose a unique “Signatory fee” on COMSAT. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Report and Order*, 11 F.C.C. Rcd 18774, 18787-788 (1996), *rev’d in part by, COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997). This Court later vacated the Commission’s creation of this new “Signatory fee” as lacking a statutory basis. *See COMSAT*, 114 F.3d at 228; *id.* at 227 (rejecting as “preposterous” the FCC’s sweeping claim of unreviewable authority to impose regulatory fees even against “an individual for eating ice cream, so long as the FCC claimed to be acting under section 9”).

In 1997, the FCC again concluded that it could not impose a regulatory fee on COMSAT in connection with COMSAT’s use of INTELSAT satellites. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1997, Report and Order*, 12 F.C.C. Rcd 17161, 17187 (1997), *modified in other respects by*,

*Amendment of the Schedule of Applications Fees Set Forth in Section 1.1102 (Wireless Services) of the Commission's Rules*, 13 F.C.C. Rcd 17150 (1998). Similarly, the Commission's 1998 regulatory fees NPRM "did not propose any changes in the policies established in [its] earlier rule making proceedings of . . . not assessing a space station fee for Comsat activities related to Intelsat and Inmarsat satellites." Br. of Respondents FCC and United States of America, *PanAmSat Corp. v FCC*, No. 98-1408 (D.C. Cir. filed April 8, 1999), at 9. Accordingly, COMSAT did not participate in the 1998 rulemaking proceeding.

The 1998 regulatory fees Order did not repeat the Commission's "1995 discussion of the inapplicability of the space station fee to Comsat's Intelsat and Inmarsat operations." *Id.* at 10 (discussing *Assessment and Collection of Regulatory Fees for Fiscal Year 1998, Report and Order*, 13 F.C.C. Rcd 19820 (1998) ("FY 1998 Order"), modified by, *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999)). Instead, the *FY 1998 Order* declined without comment to impose such fees upon INTELSAT space station operations. In 1999, the FCC again reiterated that "[r]egardless of COMSAT's interest in the INTELSAT satellites in question, they are not licensed under Title III and, therefore, not subject to regulatory fees." *FY 1999 Order*, 14 F.C.C. Rcd at 9883.

### **The *PanAmSat* Decision**

On August 31, 1998, PanAmSat Corporation (“PanAmSat”), a U.S. separate satellite system that competes with INTELSAT and COMSAT, filed a petition for review of the Commission’s *FY 1998 Order*. COMSAT was never served with a copy of PanAmSat’s petition for review. Nor did PanAmSat or the Commission notify COMSAT of the existence of any judicial proceeding that could subject COMSAT to regulatory fees. Moreover, word of PanAmSat’s petition for review was not reported in the trade press until well after the Court’s deadline for filing timely motions to intervene had passed. Due to its lack of timely knowledge of the proceeding, COMSAT did not have an opportunity to participate in the *PanAmSat* case.

On December 21, 1999, this Court vacated a portion of the *FY 1998 Order* and ruled that COMSAT was not “exempt” from paying Section 9 regulatory fees—*i.e.*, that it was not immune from paying any fees that might otherwise apply. *PanAmSat*, 198 F.3d at 894. However, the *PanAmSat* court expressly declined to reach the issue of whether INTELSAT space stations fall within the coverage of Section 9. *See id.* at 896.

## **The ORBIT Act**

The ORBIT Act, which was enacted on March 17, 2000, mandates the elimination of COMSAT's unique role as U.S. Signatory in INTELSAT and the transformation of INTELSAT from an intergovernmental treaty organization into a publicly traded company (a process scheduled to be completed on July 18, 2001). See 47 U.S.C. §§ 761-769 (Supp. 2001); *Applications of Intelsat LLC for Authority To Operate, and To Further Construct, Launch and Operate C-Band and Ku-Band Satellites*, F.C.C. 01-183 (rel. May 29, 2001), ¶¶ 8, 55 (“*Intelsat Compliance Order*”) (noting that privatization would be finalized on July 18, 2001); *INTELSAT Privatization Web Page*, <<http://www.intelsat.int/privatization.asp>> (visited May 22, 2001) (archiving announcements of achievement of various privatization milestones). Once privatization is complete, COMSAT will relinquish its Signatory status, including its exclusive U.S. obligation to participate in the financing of INTELSAT.<sup>11</sup>

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<sup>11</sup> Following privatization, INTELSAT's satellites will become subject to national regulation for the first time. A Delaware corporation, Intelsat LLC, has been formed to apply for the necessary licenses, and its application has been granted by the Commission. Upon transfer of the satellite assets to the privatized entity, the FCC will issue space station licenses to Intelsat LLC for each satellite space station currently operated by INTELSAT. See *Applications of Intelsat LLC*,  
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The ORBIT Act also makes explicit that the Commission has authority to impose the same regulatory fees on COMSAT that it imposes on providers of similar international telecommunications services. *ORBIT* § 642(c), *codified at* 47 U.S.C. § 765a(c) (Supp. 2001); *see FY 2000 Order*, 15 F.C.C. Rcd at 14489 (J.A. \_\_\_\_ ) (conceding that the ORBIT Act “does not create any new liability” for COMSAT).

### **The 2000 NPRM And Order**

Two weeks after the ORBIT Act was enacted, the FCC released its annual *Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Notice of Proposed Rulemaking*, 15 F.C.C. Rcd 6533 (2000) (“*FY 2000 NPRM*”), proposing to establish regulatory fees for the time period from October 1, 1999 to September 30, 2000. In the *FY 2000 NPRM*, the Commission proposed, for the first time, to assess regulatory fees for “[INTELSAT] satellites that are the subject of Comsat’s activities, in the amount of \$94,650 per satellite.” *Id.* at 6539 (emphasis added). The Commission also requested comment on “how the nature of Comsat services

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*Memorandum Opinion Order and Authorization*, 15 F.C.C. Rcd 15460 (2000), *recon. denied*, *Intelsat LLC, Order on Reconsideration*, 15 F.C.C. Rcd 25234, 25256 (2000); *INTELSAT Compliance Order*, ¶¶ 6, 9 (same).

via INTELSAT may provide a basis for a different fee and . . . what type of fee would be appropriate to achieve parity of treatment.” *Id.*

Shortly thereafter, the FCC issued its *FY 2000 Order* challenged here. Over the dissent of Commissioner Furchtgott-Roth, that Order directed COMSAT to pay Section 9 regulatory fees of \$94,650 per INTELSAT satellite for fiscal year 2000. *FY 2000 Order*, 15 F.C.C. Rcd at 14486-490 (J.A. \_\_\_\_). Even though COMSAT is now only one of more than 90 U.S. companies authorized to access the INTELSAT satellite system directly, and there are at least five other INTELSAT signatories with U.S. affiliates authorized by the FCC to provide services in the United States via the INTELSAT system, the *FY 2000 Order* directs *COMSAT alone* to pay Section 9 fees for the entire satellite fleet. The *FY 2000 Order* even requires COMSAT to pay U.S. regulatory fees for four satellites located above the Indian Ocean that physically cannot provide service to or from the United States. *Id.* at 14490.<sup>12</sup> (J.A. \_\_\_\_). The *FY 2000 Order* also requires

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<sup>12</sup> The five INTELSAT Signatories with U.S. affiliates that are authorized U.S. direct access customers are: British Telecom (United Kingdom Signatory, provides INTELSAT services in U.S. market through its wholly owned subsidiary BTNA); Cable & Wireless Global Networks Limited (Barbados, Jamaica, and Panama Signatory, provides INTELSAT services in U.S. market through Cable & Wireless USA, Inc.); France Telecom (French Signatory, provides INTELSAT

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COMSAT to pay Section 9 fees for the portion of fiscal year 2000 before ORBIT was enacted.

This petition for review followed. On September 15, 2000, in compliance with the Commission's procedural requirements, COMSAT paid annual regulatory fees for fiscal year 2000 in the amount of \$2,313,025. This sum includes \$1,609,050 in contested Section 9 regulatory fees on the INTELSAT satellites.<sup>13</sup>

### **SUMMARY OF ARGUMENT**

Section 9 limits the facilities on which regulatory fees may be imposed to those regulated under "47 CFR Part 25." INTELSAT satellites are not, and never have been, regulated under "47 CFR Part 25." Indeed, the Commission does not—and cannot—regulate INTELSAT's satellites at all. Accordingly, there are

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<sup>13</sup> On March 29, 2001, while the present proceeding was pending, the FCC issued its annual regulatory fees NPRM for fiscal year 2001. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2001, Notice of Proposed Rulemaking*, F.C.C. 01-97, MD Docket No. 01-76, 2001 WL 300715 (2001) ("FY 2001 NPRM"). The FY 2001 NPRM purports to subject INTELSAT satellites to Section 9 regulatory fees for fiscal year 2001. *See id.* at Attachment A ¶ 22, Attachment F ¶ 36 (including 19 INTELSAT satellites in its tally of 66 operational geostationary satellite space stations purportedly "authorized to provide service" by the FCC).

have been, regulated under “47 CFR Part 25.” Indeed, the Commission does not—and cannot—regulate INTELSAT’s satellites at all. Accordingly, there are no pertinent regulatory costs with respect to these satellites which could serve as the basis for imposing regulatory fees.

In particular, the mere fact that COMSAT applies for authority to “participate” in the launch of the INTELSAT satellites does not permit the FCC to charge Section 9 regulatory fees for these facilities. The Commission fully recovers the costs it incurs in processing these applications through COMSAT’s payment of Section 8 application fees. Unlike the situation that exists with U.S.-licensed satellites, the FCC does not regulate the INTELSAT space station facilities.

This Court’s decision in *PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), and the recently-passed ORBIT Act do not require a contrary result. *PanAmSat* expressly declined to reach the issue presented here, namely, the extent to which Section 9 permits the imposition of fees on facilities not regulated under “47 CFR Part 25.” Nor did the ORBIT Act empower the Commission to impose any new fees on COMSAT beyond those already established pursuant to Section 9.

However, even if this Court were to determine that Section 9, *PanAmSat*, or the ORBIT Act permitted the imposition of space station regulatory fees on COMSAT, the company should not, in any event, be forced to pay all the regulatory fees now sought by the Commission. Rather, any such fees should be prorated to reflect the fact that COMSAT is only one of over 200 owner/users of the INTELSAT system, and that it utilizes only about 17 percent of INTELSAT's total satellite capacity.

Furthermore, even if, *arguendo*, this Court were to hold that the ORBIT Act in particular expanded the Commission's authority to impose otherwise unlawful regulatory fees on COMSAT, the company should not be required to pay fees retroactively for the portion of fiscal year 2000 that preceded ORBIT's enactment.

### **STANDARD OF REVIEW**

This case presents a question of statutory construction as to whether Section 9 of the Communications Act, 47 U.S.C. § 159, precludes the assessment of space station regulatory fees on INTELSAT satellites that are not regulated by the Commission. In interpreting the statute, "a reviewing court's first job is to try to determine congressional intent using traditional tools of statutory construction, for if Congress has directly spoken to the precise question at issue, then the court, as well as the agency, must give effect to the unambiguously expressed intent of

Congress.” *National Ass’n of Mfrs. v. United States Dep’t of Interior*, 134 F.3d 1095, 1102 (D.C. Cir. 1998) (internal quotations and citations omitted).

Even in circumstances where a statute contains some ambiguities, an agency’s interpretation is not entitled to deference where, as here, it is plainly unreasonable. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388-90, 397 (1999). In this case, any Commission claim to deference would be further limited by the fact that it admittedly “reversed the approach taken in [its] prior fee orders.” *FY 2000 Order*, 15 F.C.C. Rcd at 14485 (J.A. \_\_\_\_). Namely, the FCC has reversed the interpretation of Section 9 that it held consistently since Section 9 was originally enacted, and that it reaffirmed in four previous orders. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference than a consistently held agency view.’”) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

## **ARGUMENT**

### **I. BECAUSE INTELSAT SPACE STATIONS ARE NOT REGULATED BY THE COMMISSION, THEY ARE NOT SUBJECT TO REGULATORY FEES UNDER SECTION 9.**

Section 9(g) of the Communications Act of 1934, as amended, imposes annual regulatory fees on various types of “Radio Facilities.” 47 U.S.C. § 159(g)

(listing regulatory fee categories).<sup>14</sup> Specifically, this section imposes one such fee on “Space Station[s] (per operational station in geosynchronous orbit) (47 CFR Part 25).” *Id.* Because it is undisputed that INTELSAT satellite space stations are not regulated by the FCC pursuant to Part 25 of the Commission’s Rules (“47 CFR Part 25”) or otherwise, INTELSAT space stations are not subject to Section 9 regulatory fees. *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 1999, Report and Order*, 14 F.C.C. Rcd 9868, 9882-83 (1999) (acknowledging that INTELSAT satellite space station facilities are not “subject to regulatory fees”); *see also supra*, at pp. 12-15 (discussing FCC’s stance from 1994 to 1999); *supra*, at p. 10 n.8 (discussing purpose of Title III).

The Commission seeks to alter the plain meaning of the statute by (1) claiming that Section 9’s reference to “47 CFR Part 25” is simply clerical and (2) postulating a non-existent distinction between foreign-licensed and non-U.S.-licensed satellites. These efforts are both strained and ultimately unsuccessful, given that the Commission does not regulate INTELSAT space stations. The FCC

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<sup>14</sup> “Radio facilities” is a term of art commonly used to connote all facilities licensed by the FCC pursuant to Title III of the Communications Act. *See supra*, at p. 10, n.8.

cannot evade these limitations by claiming that COMSAT's payment of certain Section 8 application fees obligates it to pay Section 9 regulatory fees on the INTELSAT satellites, or by asserting that COMSAT's other activities with respect to the INTELSAT system permit the imposition of Section 9 fees.

**A. The FCC Does Not Regulate INTELSAT's Space Stations.**

The purpose of the Section 9 space station fee is to enable the Commission to recover its costs of regulating communication satellite facilities. 47 U.S.C. § 159(a)(1). The FCC frustrates this purpose where, as here, it attempts to recover fees on facilities that it does not regulate (under Part 25 or otherwise) and for which, accordingly, it does not incur any Section 9 regulatory costs.

The Commission regulates COMSAT's dealings with INTELSAT in four basic ways. First, it requires COMSAT to apply for, and receive, authority to "participate" in the launch and in-orbit testing of the INTELSAT satellites. However, COMSAT already pays Section 8 application fees that cover the costs the Commission incurs in processing these applications. *See infra*, at Subpart I.B.1.<sup>15</sup> In any event, COMSAT did not submit any such applications in fiscal

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<sup>15</sup> Until 1998, the FCC also required COMSAT to apply for permission to participate in the construction of INTELSAT satellites. COMSAT paid Section 8  
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year 2000, nor did the FCC process any applications previously filed by COMSAT in fiscal year 2000.

Second, the FCC regulates COMSAT's provision of *services* to U.S. customers using INTELSAT capacity. The Commission recoups its costs associated with this regulatory activity through COMSAT's payment of international bearer circuit fees. *See supra*, at p. 12, n.10 (describing international bearer circuits).

Third, the FCC oversees COMSAT's operation of FCC-regulated earth stations that communicate with the INTELSAT satellites. The Commission recovers the costs of regulating these facilities through COMSAT's payment of Section 9 "Earth Station" fees.

Fourth, the FCC incurs costs in connection with COMSAT's Signatory responsibilities. *See supra*, at pp. 17-18 (outlining COMSAT's post-ORBIT Act Signatory responsibilities). However, the Commission is prohibited from using

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fees in connection with these applications. The agency dropped this requirement when it ceased regulating COMSAT's rates as a dominant common carrier. *See COMSAT Corp., Application for Authority to Participate in a Program for the Construction of Up to Four INTELSAT VIII Satellites*, 13 F.C.C. Rcd 25202, 25210-211 (1998).

Section 9 as a back-door mechanism to recover fees for its oversight of these responsibilities. This Court has previously held that the FCC may not assess fees on COMSAT based on costs the Commission incurs overseeing COMSAT's role as U.S. Signatory because Congress did not authorize such fees when it enacted Section 9. *See COMSAT Corp. v. FCC*, 114 F.3d 223, 227 (D.C. Cir. 1997).

Thus, to the extent permitted by law, the Commission already recovers its costs for regulating COMSAT. Based upon these facts, it is unsurprising that—despite its passing reference in the *FY 2000 Order* to the “costs of its regulatory activities, including international activities”—the Commission fails to explain what regulatory costs it incurs in regulating the INTELSAT satellites. *Assessment and Collection of Regulatory Fees for Fiscal Year 2000, Report and Order*, 15 FCC Rcd 14478, 14487 (2000) (“*FY 2000 Order*”) (J.A. \_\_\_\_).

Certainly, the Commission cannot—and does not—assert that it regulates INTELSAT satellites under Part 25.<sup>16</sup> Since the Commission first adopted the

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<sup>16</sup> Part 25 primarily governs application requirements and technical standards for domestic satellite systems and “separate” FCC-licensed international systems. *See generally Establishment of Satellite Systems Providing International Communications*, 101 F.C.C.2d 1046, 1049-50 (1985) (creating the international satellite space station application and licensing rules now codified as amended at Part 25, Subpart B, to “establish regulatory policies to consider applications for  
(continued)



space station rules now codified in Part 25, Subpart B, the FCC has always made clear that those rules do not apply to INTELSAT satellites. Indeed, if INTELSAT were not immune from regulation under Part 25, it would be subject to more than a dozen “Part 25 technical rules,” including the 2° spacing requirements of 47 C.F.R. § 25.140(b), the staggered C-band frequency plan set forth at 47 C.F.R. § 25.211(a), and the limitation on unused orbital slots contained in 47 C.F.R. § 25.140(f). *See Applications of Intelsat LLC, Memorandum Opinion Order and Authorization*, 15 F.C.C. Rcd 15460, 15466-467, 15493-508 (2000) (“*Intelsat LLC Order*”), *recon. denied, Intelsat LLC, Order on Reconsideration*, 15 F.C.C. Rcd 25234 (2000) (“*Intelsat LLC Order on Reconsideration*”) (discussing how INTELSAT would fail to comply with virtually all of the FCC’s “Part 25”

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satellite systems providing international communications services *separate from INTELSAT*)” (emphasis added), *modified in part on recon.*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon. denied*, 1 F.C.C. Rcd 439 (1986). *See also Establishment of Domestic Communications Satellite Facilities by Non-Governmental Entities*, 22 F.C.C.2d 86, 87 (1970) (establishing similar rules for U.S. domestic satellite systems); *supra*, at p. 9 n.7 (discussing general purpose of Part 25).